93-999 (1)

No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

Court, U.S.
FILED
NOV 22 1993
OFFICE

No. 93-

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

POLITICAL CONTRIBUTIONS DATA, INC., RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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December 23, 1993

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is inconsistent with *Pierce v. Underwood*, 487 U.S. 552 (1988), to require district courts to find that the government's position was not "substantially justified," and thus to award attorney fees against the government under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), whenever a federal agency's construction of a statute it administers has been rejected under deferential judicial review.

2. Whether *Pierce v. Underwood*, 487 U.S. 552 (1988), requires courts of appeals to use a deferential abuse-of-discretion standard when reviewing a district court's finding that the government's position was "substantially justified," which precludes an award of attorney fees under the Equal Access to Justice Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Federal Election Commission ("the Commission" or "FEC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *Federal Election Commission v. Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993), and suggests that the Court summarily reverse that judgment.

OPINIONS BELOW

The June 17, 1993, decision, as amended June 30 and July 9, 1993, of a panel of the court of appeals reversing the district court's judgment is reported at 995 F.2d 383 (2d Cir. 1993), and appears at Appendix ("App.") A (1a-13a) of the Commission's separately bound volume of appendices. The July 30,

1992, memorandum opinion of the United States District Court for the Southern District of New York denying Political Contributions Data, Inc. ("PCD"), attorneys' fees and other costs under the Equal Access to Justice Act is reported at 807 F. Supp. 311 (S.D. N.Y. 1992), and appears at App. B (14a-35a).

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1993. The Commission's timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on August 3, 1993 (App. C). On October 26, 1993, Justice Thomas granted an extension of time until December 31, 1993, for the Commission to file a petition for certiorari (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

For the Court's convenience, the full text of section 2412 is set out at App. G (92a-97a), and the statutory and regulatory provisions at issue in the civil

enforcement action underlying this attorneys' fees dispute are set out at App. H (98a-99a).

STATEMENT OF THE CASE

A. The Equal Access to Justice Act

Congress enacted the Equal Access to Justice Act ("EAJA" or "the Act"), 28 U.S.C. § 2412(d), "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, . . . and other costs against the United States." Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325 (1980). *See also*, H.R. Rep. No. 99-120, 99th Cong., 1st Sess., Part I, at 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132-33. EAJA does not authorize automatic fee-shifting to accomplish this goal, however. Instead, it provides for an award only if the party prevailing in a nontort civil action against the United States meets specified qualifications, *see* 28 U.S.C. § 2412 (d)(2)(B), and the court determines, *inter alia*, that the "position of the United States" was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A).

Although EAJA does not define the term "substantially justified," this Court has construed it to mean " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The question is "not what the law now is, but what the Government was substantially justified in believing it to have been" at the time the government adopted its position on the legal issues. 487 U.S. at 561. A district court's finding of substantial justification under EAJA is reviewable only under a "def-

erential, abuse-of-discretion" standard of review. *Pierce*, 487 U.S. at 560.

B. The Underlying Litigation on the Merits

In the underlying civil law enforcement suit, brought pursuant to 2 U.S.C. § 437g(a)(6), the Commission alleged that PCD, a for-profit corporation, had violated 2 U.S.C. § 438(a)(4), a provision of the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. §§ 431-455. Section 438(a)(4) directs the Commission to make all campaign finance reports and statements required to be filed by political committees available for public inspection and copying. It also provides, however, that "any information" about individual contributors copied from such documents "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes. . . ." *See also* 11 C.F.R. § 104.15. The Commission contended that PCD had violated section 438(a)(4)'s "commercial purposes" prohibition by conducting a commercial business consisting entirely of the marketing and sale of lists of individual contributors, including their name, city, state, zip code, and occupation or principal place of business, which PCD had copied from FEC computer tapes of information from political committees' reports. (App. 42a-44a.)[1]

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[1] Prior to this lawsuit, the Commission had issued an advisory opinion at the request of PCD's parent company, Public Data Access, Inc. Relying upon the regulation implementing section 438(a)(4), 11 C.F.R. § 104.15, the Commission in that advisory opinion concluded that the company's proposal to market lists of contributors copied from reports filed with the Commission would be a use for "commercial pur-

The district court found that PCD had violated the FECA. *See FEC v. PCD*, 753 F. Supp. 1122 (S.D. N.Y. 1990), *reprinted in* App. E (39a-73a). The court found it proper for the Commission "to rely on PCD's for-profit status as an indication of its commercial purpose" (App. 52a), and found reasonable the Commission's conclusion that PCD's bare lists of contributors were not within the exemption for "newspapers, magazines, books or other similar communications" the Commission had established by regulation, 11 C.F.R. § 104.15(c). (App. 58a-59a.) The court also rejected PCD's argument that the restriction in section 438(a)(4) violates the First Amendment, concluding that the provision serves two important governmental interests: protecting the property rights of the owners of contributor lists from being undermined by unauthorized and uncompensated commercial use, and minimizing the discouraging effect of public disclosure on the willingness of private individual contributors to help finance the electoral speech of candidates and political committees they support. (App. 62a-73a.) The court therefore granted summary judgment for the Commission.

The Second Circuit reversed, adopting a narrow interpretation of section 438(a)(4) that excluded PCD's activities from the provision's coverage. *See FEC v. PCD*, 943 F.2d 190 (2d Cir. 1991), *reprinted in* App. F (74a-91a). Characterizing the provision as "skeletal" (App. 84a), the court agreed that Congress had left a "gap" for the Commission to fill " 'in determining what commercial activities fall within

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poses" in violation of section 438(a)(4). *FEC Advisory Opinion 1986-25*, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5865 (Aug. 15, 1986).

the proviso's prohibition' " (App. 84a) (*quoting National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C. Cir. 1986)). The court concluded that "reference to the plain language of" section 438(a)(4) was "insufficient" to resolve the case, and therefore found it necessary to "move outside the four corners of the statute . . . in order to construe it" (*id.*). The court sought "guidance" in the Commission's implementing regulation, its advisory opinion interpreting that regulation, and the statute's legislative history (App. 85a-91a). The court also found it necessary to construe "the statute in a manner that avoids the first amendment problems" (App. 76a).

The court construed the "commercial purposes" provision to apply only to the use of contributor lists for soliciting. The court acknowledged that the Commission's construction of the statute, and of its own regulation, was entitled to deference, but found that the Commission's construction was not "a 'reasonable interpretation' of either its own regulation or § 438(a)(4)" (App. 87a). Because PCD's contributor lists did not include street addresses and contained a *pro forma* warning against using the lists for solicitation or commercial purposes, the court found that the lists were highly unlikely to be useful for solicitation (App. 89a). In these circumstances, the court decided, the lists should be treated as communications similar to the newspapers and magazines exempted by the Commission's regulation (App. 88a).

This construction, the court stated (App. 87a), would fully implement the purposes of the FECA's disclosure provision, while protecting "to the extent

possible" individual contributors' interest in personal privacy, which was the only statutory purpose of the "commercial purposes" restriction in section 438 (a)(4) that was recognized by the court (App. 87a, 88a, 90a-91a). In thus construing the statute as narrowly as possible, the court ignored the other major purpose of the provision found by the district court, namely, protection of a political committee's property interests in its contributor lists, and also refused to defer to the Commission's reconciliation of the competing purposes served by the statute.

C. The Litigation Over Attorneys' Fees

After prevailing on appeal at the merits stage, PCD filed an application for attorneys' fees and other litigation expenses under EAJA with the district court. The district court denied the application, finding that the Commission's position on the merits had been "substantially justified" within the meaning of 28 U.S.C. § 2412(d)(1)(A). (App. 15a, 23a-34a.)[2] Citing *Pierce v. Underwood*, 487 U.S. at 565, the court found that "the position adopted and pursued by the FEC had a 'reasonable basis both in law and fact' as 'could satisfy a reasonable person'" (App. 28a).

In making this determination, the court reviewed the state of the law "[a]t the time the FEC brought suit against PCD for selling lists of contributor data" (App. 24a). The court emphasized that at that time "there was little congressional or judicial

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[2] As an alternative ground for denial, the court also found that PCD's application was untimely (App. 19a-22a). The court of appeals reversed that determination and the Commission does not seek further review of that issue.

guidance concerning" the scope of the ambiguous language of section 438(a)(4), which "promoted competing interests" that the Commission was "forced to reconcile" (App. 24a, 29a). Although the court of appeals later rejected the Commission's weighing of these competing interests, the district court found the Commission's position "substantially justified" primarily because "there was never any indication prior to this litigation that the FEC's interpretation [of section 438(a)(4)] was unreasonable" (App. 29a).

In making this determination, the district court took into consideration the reasoning of the court of appeals on the merits (App. 30a-34a). However, because "Congress did not intend 28 U.S.C. § 2412 (d)(1)(A) to be an automatic fee-shifting device," the court rejected PCD's contention that the merits decision controlled the EAJA determination (App. 28a):

> [I]t is a well-established rule that a court defers to an agency's [statutory] interpretation unless it finds it to be "unreasonable." *See Chevron U.S.A. Inc. v. Nat[ural] Resources Defense Council, Inc.*, 467 U.S. [837], 844 (1984). Thus, using PCD's analysis, any decision overruling an agency's interpretation would automatically result in the Government paying attorneys' fees and expenses to the other party . . . . Accordingly, this Court may not terminate its inquiry with the Court of Appeals' conclusion that the FEC's interpretation was "unreasonable," but rather, the Court must examine the legal basis for the FEC's interpretation . . . .

In a divided decision, the Second Circuit reversed the district court's denial of the EAJA application.

The majority explicitly rejected application of the abuse-of-discretion standard of review in this case: "[W]e have no occasion to assess the merits of the district court's exercise of discretion" (App. 9a). Instead, because the merits decision had concluded that the Commission had failed to provide a "reasonable interpretation" of the relevant law, the court majority held that the merits decision "conclusively established that the Commission's position was not justified so as to bar an award of attorney's fees" under EAJA. (App. 9a.) Thus, the majority concluded that "the legal standards which governed the merits phase of this litigation are precisely those to be applied to the EAJA question" (App. 8a). The majority acknowledged that this view conflicts with the views of a number of other courts of appeals. (App. 8a.)

Judge Jacobs dissented because he did not "believe that the district court abused its discretion in finding that the Commission was substantially justified in pursuing its position on the merits" (App. 10a).

> The Commission lost its claim on the merits—in the only way it *could* lose on the merits of that claim—upon a finding that it adopted an *unreasonable* interpretation of the "commercial purposes" provision of 2 U.S.C. § 438(a)(4) (1988) and its corresponding regulation . . . . [But] [t]he EAJA reasonableness question is . . . considered from a different point of view: "not what the law now is, but what the Government was substantially justified in believing it to have been." [*Pierce v. Underwood*, 487 U.S.] at 561. Whether the Commission was substantially justified is a "historical" question. *Id.*

(App. 10a-11a.) Observing that the court's obligation was to review the district court's EAJA opinion, Judge Jacobs found that "[n]othing in the 1991 [merits] opinion requires that we now reverse the district court's ruling on the distinct, historical issue of substantial justification" (App. 11a).

> Appellant's sale of donor lists for profit was not a "commercial purpose" under § 438(a)(4), as the 1991 panel held, but that result was not a foregone conclusion. The 1991 opinion found that § 438(a)(4) was made "skeletal" in order to permit the Commission to define the "commercial purposes" prohibition; that "we must . . . seek further guidance outside the FECA itself"; and that "the best guidance" is provided by legislative history. 943 F.2d at 194-98. A holding of unreasonableness at the merits stage, however sound, is not necessarily a predictable result, especially where it turns in large part (as here) on legislative history.

(App. 11a-12a.) Pointing out that this Court had already ruled in *Pierce* that a district court's finding of substantial justification under EAJA is subject only to deferential review, Judge Jacobs found that "the district court's findings easily withstand review for abuse of discretion" (App. 12a-13a).

> [T]he district court's carefully considered opinion held that the Commission was substantially justified *ex ante* in pursuing a position that the district court upheld on summary judgment, but that this Court, by way of a different analysis, held to be unreasonable. The district court has given detailed consideration to several factors, including the clarity of governing law at the

> time the Commission acted; the foreseeable length and complexity of the litigation; and the consistency of the Commission's position.

(App. 12a.) Finally, Judge Jacobs pointed out how the majority opinion had effectively rejected this Court's view of both the standard of review and the "substantial justification" inquiry (App. 13a):

> To the extent the majority expands the 1991 reasonableness analysis to resolve the EAJA issue, the majority is engaging in *de novo* review. To the extent the majority relies on the 1991 opinion's outcome, the majority treats EAJA as a fee-shifting statute.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals effectively adopted a *per se* rule that, as the district court explained (see p. 8, *supra*), would transform EAJA into an automatic fee-shifting device whenever the government loses a case on the merits because its interpretation of a statute or regulation it administers is not accepted by a court applying the usual deferential standard of review established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This decision directly contradicts this Court's construction of EAJA in *Pierce v. Underwood*, 487 U.S. 552 (1988), and conflicts with the holdings of a majority of the other circuits. Cases litigated under this deferential standard are ubiquitous, and in no sense the "unusual situation" postulated by the majority below (App. 9a). Automatic attorneys' fee awards in this large class of cases would be an unnecessary and unjustifiable drain on the federal treasury. Moreover, the

threat of automatic fee-shifting would be a deterrent to the government in pursuing cases of first impression or adopting a plausible construction of a statute that serves the public interest but might present a risk of judicial rejection under the usual deferential standard of review. None of this was intended by Congress when it enacted EAJA as a limited waiver of sovereign immunity. This decision presents a direct conflict among the circuits on an issue of substantial importance, which warrants plenary review by this Court.

As we explain below, the court of appeals failed to follow this Court's holdings in *Pierce* in two fundamental ways. First, the court effectively adopted a *per se* rule that a merits decision rejecting the government's construction of a statute as unreasonable under deferential review binds the district court to conclude that the government's position was not "substantially justified" under EAJA. Second, the court refused to review the district court's substantial justification determination under the deferential abuse-of-discretion standard that this Court found to be required under EAJA. Because the court of appeals so plainly refused to follow this Court's unequivocal rulings on these issues in *Pierce v. Underwood*, we suggest that summary reversal is appropriate in this case.

I. THE COURT OF APPEALS FAILED TO FOLLOW THE STANDARD ADOPTED BY THIS COURT FOR DETERMINING WHETHER THE GOVERNMENT'S POSITION IS "SUBSTANTIALLY JUSTIFIED" UNDER EAJA

This Court has held that to be "substantially justified" within the meaning of EAJA, the government's position need not be " 'justified to a high degree,' "

but only "to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. at 565 (citation omitted). "[A] position can be justified even though it is not correct, and . . . it can be substantially (*i.e.* for the most part) justified if a reasonable person could think it correct," *id.* at 566 n.2. Since "[a]t the attorneys' fees stage it will always be the case that the government's position has been rejected," *Trahan v. Brady*, 907 F.2d 1215, 1218 (D.C. Cir. 1990), the mere "[f]ailure to prevail does not raise a presumption of lack of substantial justification" and "[t]he government need not . . . 'show that it had a substantial likelihood of prevailing.'" *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1230, 1231 n.4 (9th Cir. 1990) (*quoting United States v. First Nat'l Bank of Circle*, 732 F.2d 1444, 1447 (9th Cir. 1984)). *Accord, e.g., United States v. One Parcel of Real Property*, 960 F.2d 200, 208 (1st Cir. 1992); *Keasler v. United States*, 766 F.2d 1227, 1231 (8th Cir. 1985). This Court has noted that this standard permits an award of attorneys' fees only "in a very small category of cases," *Pierce*, 487 U.S. at 574.

In *Pierce*, 487 U.S. at 560-61, the Court explained that even in cases in which the merits involve only a pure question of law, the substantial justification issue under EAJA "will not be precisely the same as the merits: not what the law now is, but what the Government was substantially justified in believing it to have been." This EAJA determination is a question "of entirely historical interest," 487 U.S. at 561, in which the court is to analyze "the government's position looking prospectively from the time the government took this position, without the ad-

vantage of [the court's] subsequent pronouncement on the actual meaning of the law." *Trahan v. Brady*, 907 F.2d at 1219.[3]

The court of appeals in this case rejected application of the historical test for substantial justification adopted in *Pierce*, holding instead that, because the agency's statutory interpretation had been rejected on the merits under a standard of review requiring deference to a reasonable agency construction, "the legal standards which governed the merits phase of this litigation are precisely those to be applied to the EAJA question" (App. 8a). The court concluded that this determination by the merits panel controls the substantial justification issue under EAJA, so that the district court was precluded from engaging in the historical inquiry required by *Pierce* and its progeny. (App. 9a.)

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[3] Contrary to the apparent view of the court below (App. 9a), this inquiry is not altered when First Amendment issues are raised. Even in cases where the government's position was actually found to be unconstitutional, the courts have not awarded attorneys' fees under EAJA unless the government's position on the merits was not substantially justified. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1230-1231 (9th Cir. 1990); *Grace v. Burger*, 763 F.2d 457, 458-59 (D.C. Cir.), *cert. denied*, 474 U.S. 1026 (1985). In this case, however, the district court explicitly upheld the constitutionality of the Commission's construction of 2 U.S.C. § 438 (a) (4) (App. 62a-73a), and the court of appeals declined to reach the constitutional issues because of its narrow construction of the statute (App. 77a, 91a). Moreover, the D.C. Circuit has since upheld the constitutionality of section 438(a) (4), adopting one of the constitutional arguments that the Commission also advanced, but without success, at the merits stage of this litigation. *FEC v. International Funding Institute, Inc.*, 969 F.2d 1110 (D.C. Cir.) (*en banc*), *cert. denied*, 113 S.Ct. 635 (1992).

The adoption of a *per se* rule requiring EAJA awards whenever the government loses a case because its statutory construction is found unreasonable under deferential judicial review cannot be reconciled with this Court's decision in *Pierce*. To the contrary, the Court there found that "the question whether the Government's litigating position has been 'substantially justified' is . . . a multifarious and novel question, little susceptible, for the time being at least, of useful generalization" and refused " 'either to fix or sanction narrow guidelines for the district courts to follow.' " 487 U.S. at 562 (*quoting Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10-11 (1980)). Moreover, the Court reached that conclusion in a case that itself involved judicial rejection, under the deferential standard of review, of the government's interpretation of a statute it administers. The government had settled the underlying lawsuit only after "every court to hear the merits (nine District Courts and two Courts of Appeals) rejected the Government's position." 487 U.S. at 569. The appellate court's decision on the EAJA application had opined that "the decision of the District of Columbia court on the merits . . . establishes that the Secretary had no reasonable basis in law." *Underwood v. Pierce*, 761 F.2d 1342, 1346 (9th Cir. 1985) (citing *Underwood v. Hills*, 414 F. Supp. 526, 531 (D.D.C. 1976), and the conclusion in *Dubose v. Pierce*, 579 F. Supp. 937, 950 (D. Conn. 1984),[4] that

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[4] The Second Circuit vacated the district court's judgment, 761 F.2d 913 (2d Cir. 1985), and this Court then vacated the Second Circuit's judgment in light of *Pierce v. Underwood*. See 487 U.S. 1229 (1988). On remand, the court of appeals affirmed the district court. 857 F.2d 889 (2d Cir.), *cert. denied*, 490 U.S. 1007 (1989).

the Secretary's position was "unreasonable" and "had no justifiable basis"). Other courts had also "flatly and unequivocally rejected" the government's construction of the statute, *Abrams v. Hills*, 547 F.2d 1062, 1067 (9th Cir. 1976), *judgment vacated in light of settlement*, 455 U.S. 1010 (1982), finding the government's position "unreasonable," *Dubose v. Hills*, 405 F. Supp. 1277, 1292 (D. Conn. 1975), and its interpretation not entitled to deference because it was "not 'consistent with the congressional purpose' . . . [and] there are ' "compelling indications that it is wrong." ' " *Ross v. Community Services, Inc.*, 405 F. Supp. 831, 835 (D. Md. 1975) (citations omitted), *aff'd mem.* 544 F.2d 514 (4th Cir. 1976), *judgment vacated in light of settlement*, 455 U.S. 1010 (1982).

On this record, the Court refused to adopt the very *per se* test adopted by the appellate court in this case.

> Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified. Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely it could take a position that is substantially justified, yet lose.

Pierce, 487 U.S. at 569. The Court concluded that even the uniform "string of losses" in eleven courts that the government had suffered in *Pierce* was not "enough to decide the present case," and that it still was necessary to review "the actual merits of the Government's litigating position." *Id.*

The rule adopted by the court below also directly conflicts, as the court acknowledged (App. 8a), with the law of most of the other circuits, which have held

that even a decision on the merits finding the government's position unreasonable or arbitrary and capricious does not foreclose a finding at the EAJA stage that the government was substantially justified. In the Fifth Circuit, for example, a merits decision that "determined that [agency regulations] amounted to an unreasonable interpretation of the statute," was found not to be "conclusive on the substantial justification question, else in this class of case the substantial justification issue would always simply merge with the decision on the merits." *Griffon v. United States Dep't of Health and Human Services*, 832 F.2d 51, 52 (5th Cir. 1987). The Fifth Circuit recently reversed a district court's EAJA award that was based solely upon the rejection of the government's construction of the statute on the merits, finding that the district court thereby "misapprehended the governing legal standards," *Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 840 (5th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3254 (U.S. No. 93-471, Sept. 20, 1993). The Ninth Circuit has also specifically rejected the position accepted by the court below that "the deference given to an agency's interpretation of its organic statute under *Chevron* . . . demonstrates that a court's finding that an agency has acted contrary to law implicitly indicates that its action was unreasonable" for EAJA purposes. *Kali v. Bowen*, 854 F.2d 329, 333 (9th Cir. 1988).[5]

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[5] The court majority below relied (App. 7a, 8a) upon *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330 (9th Cir. 1992). As shown in the text, however, the Ninth Circuit explicitly rejected the *per se* rule adopted below in the *Kali* decision, and the *Oregon* court relied upon *Kali*. *Oregon*, 980 F.2d at 1332. Unlike the court below, the *Oregon* court did not hold that the EAJA decision is controlled by a

In sum, the other circuits have concluded, in conflict with the decision below, that "[s]uch a *per se* rule is inappropriate under the *Pierce* regime." *Trahan v. Brady*, 907 F.2d at 1220. Instead, because the "substantially justified" question under EAJA is governed by a standard "that is separate and distinct from whatever legal standards governed the merits phase of the case," at "the EAJA stage, the court is not wedded to the underlying judgment on the merits in assessing either the Government's litigation position or its underlying conduct." *FEC v. Rose*, 806 F.2d 1081, 1087 (D.C. Cir. 1986).[6]

II. THE COURT OF APPEALS REFUSED TO APPLY THE ABUSE-OF-DISCRETION STANDARD OF REVIEW ADOPTED BY THIS COURT

"In *Pierce* [*v. Underwood*, 487 U.S. 552 (1988)], the Court held a District Court's determination under the Equal Access to Justice Act . . . that 'the position

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merits determination that the government's position was unreasonable, but only that the merits court's conclusion that the statutory language and legislative history were clear and unequivocal could not be rejected by the district court at the EAJA stage. 980 F.2d at 1332. Of course, the failure of the court below to follow the construction of EAJA in *Pierce v. Underwood* would not be justified even if the *Oregon* court had made the same mistake.

[6] *See also, e.g., Sierra Club v. Secretary of Army*, 820 F.2d 513, 517 (1st Cir. 1987); *United States v. Paisley*, 957 F.2d 1161, 1167 (4th Cir.), *cert. denied sub nom. Crandon v. United States*, 113 S.Ct. 73 (1992); *Abernathy v. Clarke*, 857 F.2d 237, 238 (4th Cir. 1988); *Welter v. Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991); *Pottgieser v. Kizer*, 906 F.2d 1319, 1323, 1324 (9th Cir. 1990); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 466-67 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988).

of the United States was substantially justified' should be reviewed for an abuse of discretion." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990). This standard is not limited to factual aspects of the substantial justification determination; "*Pierce* also concluded that [a] district court's rulings on legal issues should be reviewed deferentially." *Id.* The courts of appeals, other than the majority below, have agreed that "the unqualified directive of *Pierce* to review EAJA decisions for abuse of discretion" requires an appellate court to review a district court's "denial of EAJA fees and its determination that the government's position was substantially justified under the 'abuse of discretion' standard." *Trahan v. Brady*, 907 F.2d 1215, 1217 (D.C. Cir. 1990). *Accord, e.g., United States v. One Parcel of Real Property*, 960 F.2d 200, 208 (1st Cir. 1992); *Young v. Sullivan*, 972 F.2d 830, 835 (7th Cir. 1992); *Forest Conservation Council v. Devlin*, 994 F.2d 709, 711 (9th Cir. 1993).

Despite this Court's plain directive, however, the majority below explicitly disavowed that standard of review, stating that "we have no occasion to assess the merits of the district court's exercise of discretion" (App. 9a). Such explicit rejection of the standard of review mandated by this Court cannot be permitted to stand.

III. THE DISTRICT COURT'S FINDING THAT THE COMMISSION'S POSITION ON THE MERITS WAS SUBSTANTIALLY JUSTIFIED UNDER EAJA WAS NOT AN ABUSE OF DISCRETION

The district court carefully applied the analysis of EAJA in *Pierce v. Underwood*, 487 U.S. at 563-571, and determined that under that standard the

Commission's position on the merits was "substantially justified" (App. 23a). The district court's decision was based on a detailed historical inquiry into the facts and circumstances under which the Commission adopted the position that the court of appeals later held to be incorrect (App. 23a-26a, 28a-31a, 33a-34a). The majority opinion below did not dispute any of these findings, and Judge Jacobs affirmatively found that "the district court's findings easily withstand review for abuse of discretion" (App. 13a).

The district court explained that "[a]t the time the FEC brought suit against PCD for selling lists of contributor data, in violation of 2 U.S.C. § 438(a)(4), there was little congressional or judicial guidance concerning the relevant statutory provisions" (App. 24a). The "congressional enactments promoted competing interests" (*id.*), and "the legislative history supplied the FEC with few guidelines" for interpreting section 438(a)(4) (App. 25a). Moreover, the one judicial precedent on point had explicitly found the statute and legislative history ambiguous; that court offered no substantive interpretation of the provision, but "instead found that Congress, in enacting 2 U.S.C. § 438(a)(4), had ' "left a gap for the [FEC] to fill" in determining what commercial activities fall within the proviso's prohibition' " (App. 25a) (*quoting National Republican Congressional Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C. Cir. 1986)). The Commission, therefore, "was forced to reconcile" conflicting statutory goals "in the absence of any contrary, or even clear, guidance from either Congress or the courts" (App. 29a). "Given the conflict between FECA's terms, the lack of congressional and judicial guidance, the ambiguous gap which the FEC was required to fill, and that the legislative his-

tory only established a 'newspaper exception,' not an exception encompassing 'similar communications,' this Court finds that the FEC's position had a reasonable basis in law and was 'substantially justified.' " (App. 30a.) (Footnote omitted.)

The district court's findings were entirely reasonable. It has long been recognized that the fact that a case presented an issue of first impression on the merits weighs heavily in the government's favor under EAJA.[7] The district court's initial ruling on the merits in the Commission's favor, while not controlling, is another recognized factor supporting a finding of substantial justification.[8]

The district court also explicitly took into account the court of appeals' decision on the merits. Although, as noted *supra*, p. 8, the district court found that the merits decision was not controlling on the EAJA issue, the court examined the reasoning of the merits decision closely. It noted (App. 24a) that the court of appeals itself had "recognized the tension between" the specific restrictions in section 438(a)(4) and the FECA's more general interest in disclosure, and had found the "plain meaning" rule insufficient to resolve the problem of interpreting sec-

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[7] *See, e.g., De Allende v. Baker*, 891 F.2d 7, 13 (1st Cir. 1989); *Mattson v. Bowen*, 824 F.2d 655, 657 (8th Cir. 1987); *Grace v. Burger*, 763 F.2d at 459; *Boudin v. Thomas*, 732 F.2d 1107, 1116 (2d Cir. 1984); *Spencer v. NLRB*, 712 F.2d 539, 559 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

[8] *See, e.g., Sierra Club v. Secretary of the Army*, 820 F.2d 513, 519 (1st Cir. 1987); *Battles Farm v. Pierce*, 806 F.2d 1098, 1104 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1046 (1987); *Porter v. Heckler*, 780 F.2d 920, 922 (11th Cir. 1986).

tion 438(a)(4). (App. 24a-25a.)[9] The district court concluded that the Commission's attempt to balance these goals was not unreasonable simply because the court of appeals later "placed greater emphasis on the importance of public disclosure than the FEC had" (App. 30a). As Judge Jacobs pointed out, the merits panel's holding that PCD's "sale of donor lists for profit was not a 'commercial purpose' under § 438(a)(4) . . . was not a foregone conclusion." (App. 11a.)[10]

Indeed, the novelty and complexity of the issues of policy, statutory interpretation, and constitutionality involved in applying 2 U.S.C. § 438(a)(4) are demonstrated by the D.C. Circuit's unanimous *en banc* decision in *FEC v. International Funding Institute*, 969 F.2d 1110 (D.C. Cir.), *cert. denied*, 113 S.Ct. 635 (1992). The D.C. Circuit in that case

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[9] The erroneous statement in the majority opinion below (App. 9a) that the merits court found the Commission's interpretation "unreasonable in light of the plain language . . . of the statute" is inexplicable, for Judge Jacobs expressly noted that "[t]he 1991 opinion found that § 438(a)(4) cannot be literally applied" (App. 11a).

[10] The Commission could not anticipate that the court of appeals would insist upon strictly subordinating the restrictions set out in section 438(a)(4) when they conflict with the statute's broader disclosure goals despite this Court's view that "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). Nor could the Commission predict that the court of appeals would restrict application of section 438(a)(4) to the examples given in the legislative history, since this Court "has never required that every permissible application of a statute be expressly referred to in its legislative history," *Moskal v. United States*, 111 S.Ct. 461, 467 (1990).

rejected a First Amendment challenge to section 438 (a)(4), relying on a statutory purpose that the Second Circuit had refused to take into consideration in construing the provision.

In narrowly construing section 438(a)(4)'s prohibitory language, the Second Circuit focused exclusively on one goal explicitly mentioned in the provision's scant legislative history, that of protecting the privacy of contributors. The court studiously ignored the district court's finding that section 438 (a)(4) serves a second significant governmental interest—protecting the property rights of political committees who invest substantial resources in developing the contributor lists they are required to submit for public disclosure (App. 56a, 58a). In contrast, the D.C. Circuit agreed with the Commission that, "as can be seen from the face of the statute, § 438(a)(4) protects a political committee against losing the economic value of its contributor list merely because it must publicly disclose the list." 969 F.2d at 1116. The D.C. Circuit also found this separate statutory purpose sufficiently important to withstand a First Amendment challenge. In fact, the D.C. Circuit found that careful protection of political committees' property interest in their solicitation lists actually promotes, rather than undermines, First Amendment values, 969 F.2d at 1116-1117, and a concurring opinion cautioned that if the statute did not adequately protect the property interests of political committees, the disclosure requirement of the FECA might itself be in constitutional jeopardy as "a taking under the Fifth Amendment." 969 F.2d at 1121 (Randolph, J., concurring). In these circumstances, the D.C. Circuit found it unnecessary even to address the interest in protecting contributors from harass-

ment, the only statutory purpose given any credence in the Second Circuit's construction of section 438 (a)(4).

The conflicting analyses of the Second Circuit and the D.C. Circuit dramatize the ambiguity of the role of section 438(a)(4) in this complex statutory scheme and the sophisticated considerations involved in construing the provision. The district court in the present case properly took these complexities into account in determining that the Commission's position was "substantially justified" under EAJA, and Judge Jacobs properly applied the standard of review mandated by the Court in concluding that the district court's thoughtful decision was not an abuse of discretion.

CONCLUSION

For the reasons set out above, the Court should grant the Federal Election Commission's petition for a writ of certiorari and summarily reverse the decision of the Second Circuit in this case.

Respectfully submitted,

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December 23, 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 360773 87006